

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT 308 HON. CHARLES W. MC

COY, JUDGE

RICHARD BOEKEN,)
)
PLAINTIFF,)
)
VS.) SUPERIOR

COURT

BC 226593

PHILIP MORRIS, INCORPORATED,)
A CORPORATION; INTERNATIONAL HOUSE)
OF PANCAKES, INCORPORATED, A)
CORPORATION,)
)
DEFENDANTS.)
)

PROCEEDINGS

REPORTER'S DAILY TRANSCRIPT OF

THURSDAY, MAY 17, 2001

P.M. SESSION

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OFFICIAL REPORTER

I N D E X

THURSDAY, MAY 17,

2001..... 5895:3
1:45

P.M..... 5895:7

ARGUMENT (RESUMED)

BY MR.

PIUZE..... 5895:21
5895

1 CASE NUMBER: BC 226593
2 CASE NAME: BOEKEN v. PHILIP MORRIS
3 LOS ANGELES, CALIFORNIA Thursday, MAY 17, 2001
4 DEPARTMENT 308 HON. CHARLES W. MC COY,
JUDGE
5 APPEARANCES: (AS NOTED ON TITLE PAGE.)
6 REPORTER: LINDA STALEY, CSR NO.
3359, RMR, CRR
7 TIME: 1:45 p.m.

8
9
10
11
12 THE COURT: Our jury panel is with us;
counsel are
13 present as well.
14 Good afternoon, counsel
15
16 (Chorus of good afternoon's.)
17
18 THE COURT: Good to see you.
19 Mr. Piuze.
20
21 ARGUMENT (resumed)
22 by MR. PIUZE:
23 Well, Your Honor, I figure when two
of the
24 jurors don't come back, maybe I spent too much time
on teen
25 smoking.
26 And there's so much stuff here, I've
got to
27 make a command decision, and the decision is, risk
boring
28 some of you by banging away at this stuff again. I
think
5896
1 it's super important. So I mean, there's so many
votes for
2 that. And let it slide in order not to bore you.
But maybe
3 one of these documents or one of the things that I
think is
4 important here slipped during the trial.
5 So I'm going to vote for boring you.
But with
6 an asterisk. I think this stuff here is super
important. I
7 think that out of all of the tens of thousands or
however
8 many juries there have been in the United States
that have
9 ever looked at anything in a civil case, ever, any
kind of a
10 civil case, ever, that you are one of the extreme
few jurors
11 ever to lay eyes on stuff like this in hundreds of
years.
12 MR. LEITER: I'm going to object to that,
Your Honor.
13 THE COURT: Sustained.
14 MR. PIUZE: Can you turn that on for me,
please.
15 Okay. The purpose of showing you
this teen
16 smoking thing, which I'm going to do quickly, is
not for the
17 truth of the matter stated in here. It is to show
what
18 professor Cobbs Hoffman, number one, and Ellen
Merlo, number
19 two, have to think or what they've avoided thinking

or how
20 they responded to certain of these charges.
21 Ms. Merlo, don't forget, ascribes and
22 subscribes to a clipping service, and because she's
what she
23 does in the corporation, anything that the press
writes about
24 comes to her attention. So she sees it. She sees
it
25 automatically. She looks at it. And she was up
here to
26 respond to some of these things. So I'll just take
a couple
27 minutes, go through it. Go on to the next topic.
28 This is the 1999 -- on October 31st

of 1999,
5897

1 the San Diego union. And this is a guy named
Pierce, who's
2 at the ucsd. And professor Cobbs Hoffman was
familiar with
3 him. He surveyed teen smokers to find out what
made them
4 smoke.

(Paraphrased reading:)

5
6
7 Most popular response:
8 Cigarette ads, 2 to 1. Anti-smoking ads, he
9 says, are merely a high profile smoke
screen,
10 probably intended to shield big tobacco from
11 lawsuits. Smoking ads cost the industry
over
12 \$5 billion year.

13
14 L.A. times, 1998, in May.

(Paraphrased reading:)

15
16
17 Smoking about image. 3,000
18 teenagers will light up for the first time
19 today. I want to look cool.

20
21 San Diego, March, 2000.

(Paraphrased reading:)

22
23
24 City council down there in
25 national city was requiring an ordinance
26 requiring merchants to keep cigarettes and
27 other tobacco products behind the counter

and
28 when within 1,000 feet of schools. The law

5898

1 could require that stores near schools keep
2 tobacco ads away from products, like candy.

3 We know that the tobacco
4 industry strategically places their products
5 next to products that appeal to -- excuse
6 me -- next to products that appeal to
7 children, particularly in stores near
8 schools, says Deborah Kelley, American lung
9 association V.P. for governmental relations.
10 That's why we feel there has to be a visual
11 separation to sever the connection between

12 the 3 musketeers and the Marlboro man.
 13
 14 San Diego, may 18, 2000.
 15 (Paraphrased reading:)
 16
 17 Cigarette makers have
 18 increased advertising in magazines with
 large
 19 teen audiences since 1998.
 20
 21 San Diego, November 30, 2000.
 22 (Paraphrased reading:)
 23
 24 State school superintendent
 25 delane eastin and local American lung
 26 association are urging schools to reject
 free
 27 textbook covers from cigarette maker
 28 Philip Morris.
 5899
 1 November 29, 2000, L.A. times.
 2 (Paraphrased reading:)
 3
 4 Shasta county high school
 5 district gets handout 1,000 philip morris
 6 book covers with Philip Morris written on
 7 cover. District disposed of them.
 8
 9 L.A. times, November 17th, 2001.
 10
 11 Philip Morris stops sending
 12 free book covers to California public
 schools
 13 but has not agreed to recall them.
 14 The covers were an attempt by
 15 Philip Morris to promote its corporate
 16 identity and, consequently, in cigarettes to
 17 children through illustrated book covers,
 18 said attorney general bill Lockyear.
 19
 20 Ms. Merlo told us, you, us, all of us
 here,
 21 that the new Philip Morris -- first of all, denying
 that the
 22 old Philip Morris ever targeted kids, ever --
 looking at
 23 those blow-ups that I showed you this morning and
 say, who
 24 can explain them, who knows why, but that sure
 wasn't us. It
 25 was someone that snuck into our building at night.
 26 But if we did, we would never do it
 anymore.
 27 Our stockholders wouldn't allow it. We would never
 do it
 28 anymore. And I asked her -- and I showed her some
 of these
 5900
 1 very things here -- would the American lung
 association trust
 2 Philip Morris any further than they could throw it?
 3 No.
 4 Would the committee for tobacco-free

kids trust
 5 Philip Morris any further than it could throw it?
 6 No.
 7 How about the State Department
 superintendent
 8 of schools here in California -- no -- bill
 lockyear?
 9 No. They wouldn't trust us.
 10 But, ladies and gentlemen, you, you
 should
 11 trust us.
 12 So that's what I have to show about
 kids and
 13 smoking. No kids; no smoking. No smoking; no
 profits.
 14 Ellen Merlo saying, we will stop
 selling to
 15 kids and targeting kids is like that guy in 1954
 saying, if
 16 this product is harmful, we'll stop, we'll got out
 of the
 17 business.
 18 It's like Bible saying in 1998 in
 Minnesota
 19 under oath, if he thought one person died from this
 -- what a
 20 stupid thing to say, if I thought one person --
 where's he
 21 been hiding -- died from this, we'd be out of
 business.
 22 We'll stop business.
 23 That's ridiculous. It's an insult to
 the
 24 intelligence of anyone.
 25 Let me take a little historical run
 here on
 26 some of these things that were being said by --
 27 Mr. Boeken was a young man, and when
 there was
 28 some sort of a knowledge out there that he
 absolutely should
 5901
 1 have had, should have figured out, should have
 felt, let's go
 2 through a little historical stuff here. Please.
 3 Here is March of '65. This is the
 tobacco
 4 institute.
 5 The cigarette manufacturers told
 Congress
 6 through the chairman of the board of R.J. Reynolds,
 who was
 7 appearing for the whole industry, spokesman for
 nine
 8 cigarette manufacturing companies, expressed
 industry
 9 opposition to regulation.
 10 (Paraphrased reading:)
 11
 12 The cigarette industry's
 13 position is based on three bases.
 14 First, the industry is
 15 profoundly conscious of the questions

16 concerning smoking and health.
17 Second, many scientists are
of
18 the opinion that it has not been established
19 that smoking causes lung cancer or any
20 disease.
21 Third, a great deal more
22 research needs to be done.
23
24 This is a transition document. I'll
state that
25 lawyers were in charge of medical and/or scientific
decisions
26 at the tobacco companies. Decisions on whether or
not to do
27 legitimate scientific testing, legitimate
biological testing
28 were not made with the scientists or doctors who
should have
5902
1 been in charge of them, or at least not totally
made. These
2 decisions were influenced by attorneys almost all
the way.
3 The attorneys got involved because,
one, they
4 wanted to preserve some sort of a litigation
strategy for
5 right now, today; whether today was going to be
1975 or '85
6 or '95 or 2005 didn't matter. But rather than
develop these
7 products in order to guard health, what was being
considered
8 was litigation strategy, and what was being
considered was
9 influencing Congress. So this is one of the
documents that
10 starts talking about that, and there'll be others.
11 This is an important document, right
here.
12 October 14, 1969. And this is Mr. Wakeham. He was
one of
13 the top two guys across the top line.
14 (Paraphrased reading:)
15
16 The scientific expertise of
17 the industry, because of the liability suit
18 situation, has not been permitted to make a
19 contribution to the problem, a contribution
20 which I believe was and is vital because the
21 industry scientists are willing to consider
22 the scientific problem from the point of
view
23 of the industry rather than from the
position
24 of the Public Health agency.
25
26 And then (paraphrased reading):
27
28 At the beginning of our
5903
1 support of smoking and health research, this

2 failure may have been connected with our
3 consistent denial of the statistics and our
4 continued assertion that this is nothing to
5 the cigarette causation hypothesis.
6
7 1967. This to Clements. Clements is
with the
8 tobacco institute.
9 (Paraphrased reading:)
10
11 The tobacco industry has a
12 very serious problem in the current tobacco
13 health controversy. It is rapidly becoming
14 worse. Prior to 1954, the problem was
mainly
15 a public relations problem, and our
opponents
16 had no effective base to work from. In
17 December of '53 with the publishing of the
18 Wynder, graham and Croninger paper, the
19 problem not only intensified, but became a
20 scientific one.
21 In the last 14 years, this
22 problem has become much more complex, more
23 involved and much more serious. Although
24 this problem has public relations, business,
25 legal and political components, it is
26 basically a scientific one. So far,
however,
27 the major efforts of the industry to cope
28 with this probe have been other than
5904
1 scientific.
2
3 Here's 1970. This is Mr. Wakeham.
This is
4 Philip Morris. December.
5 (Paraphrased reading:)
6
7 It has been stated that CTR
is
8 a program to find out "the truth about
9 smoking and health." What is truth to one
is
10 false to another. CTR and the industry have
11 publicly and frequently denied what others
12 find as "truth." Let's face it. We're
13 interested in evidence which we believe
14 denies the allegation that cigarette smoking
15 causes disease. If the CTR program is aimed
16 in this direction, it is, in effect, trying
17 to prove the negative, that cigarette
smoking
18 does not cause disease. Both lawyers and
19 scientists will agree that this task is
20 extremely difficult, if not impossible.
21
22 Which gets me to what I believe --
excuse me --
23 what gets me to the most important exhibit in this
case. And
24 this is the roper proposal of 1972. And this is
the height

25 of hypocrisy right here.
 26 Dr. Benowitz talked about the fact
 that when
 27 you've got someone who is addicted, a person who's
 addicted
 28 is going to tell themselves stories, and whether
 you call it,
 5905
 1 rationalize or whatever you call it, someone who's
 hooked is
 2 looking for a reason to believe that they can
 continue in
 3 their conduct. And I think that's something that's
 probably
 4 disputed here. Someone that's hooked is more apt
 to believe
 5 a story than someone who isn't.
 6 This is the hook. This is where they
 talk
 7 about the hook. Right here.
 8 (Paraphrased reading:)
 9
 10 For nearly 20 years, this
 11 industry has employed a single strategy to
 12 defend itself on three major fronts --
 13 litigation, politics and public opinion.
 14 While the strategy was
 15 brilliantly conceived and executed over the
 16 years helping us win important battles, it
 is
 17 only fair to say that it is not -- nor was
 it
 18 intended to be -- a vehicle for victory. On
 19 the contrary, it has always been a holding
 20 strategy, consisting of . . .
 21
 22 Now, obviously, during the course of
 this
 23 trial -- I'll put that where the jury can see it.
 And during
 24 the course of this trial -- this is the long time
 line.
 25 This will not go to the jury, and so
 I'm going
 26 to bring it out in a little while and discuss as it
 related
 27 to Mr. Boeken.
 28 But what they say in writing for the
 world to
 5906
 1 see is that they are going to try to create a doubt
 in
 2 People's minds about what these scientists say
 without
 3 actually denying the charge.
 4 Now, please think about this here.
 Whether
 5 it's Richard Boeken or the 5 million or 10 million
 or
 6 30 million other smokers that have a heck of a lot
 of trouble
 7 quitting, one of the reasons they have a little
 trouble

8 quitting or a heck of a lot of trouble quitting is
because
9 there was doubt forever and ever purposely
implanted in their
10 brains about whether it was really true what
everyone said;
11 is it really true that smoking causes lung cancer?
12 As recently as last week, Dr.
Hoshizaki said,
13 well, you know, only 20 percent get it, 80 percent
don't. We
14 can't get it in animals, we can't put a human tumor
in
15 animals, we still can't. I mean, these were
important
16 questions. We could never figure these things out.
I, as a
17 biologist professor at the university, couldn't
figure these
18 things out. And we still don't have answers to
these
19 questions.
20 Well, these questions were out there
and people
21 that want to, need a reason to, make believe or
have
22 something to grab onto were hand fed this starting
way before
23 1972.
24 This is what you're going to be
reading. The
25 judge will read jury instructions. Later on, the
jury
26 instructions will be given to you. There are about
four or
27 five or six different kinds of fraud that are
claimed in this
28 case. Let's start with this.

5907

1 (Paraphrased reading:)
2
3 The essential elements of a
4 claim of fraud by an intentional
5 misrepresentations are:
6 Philip Morris must have made
a
7 representation as to a past or existing
8 material fact.
9
10 It won't hurt you. We're united in
your
11 health. Our products are safe. We'll work closely
with the
12 authorities to take care of it.
13 Mr. Weisman; we'll close the doors if
we think
14 it will hurt you.
15 Mr. Bible; we'll go out of business,
et cetera,
16 et cetera, et cetera.
17 (Paraphrased reading:)
18
19 The representations must have

20 been false.
21 Philip Morris must have known
22 that the representation was false when it
23 made it.
24 Or must have made the
25 representation recklessly without knowing
26 whether it was true or false.
27
28 Let's think about that. If Philip
Morris
5908
1 truly, with all of the resources at its beck and
call, did
2 not know for sure whether or not tobacco caused
cancer, why
3 in the world should it deny such a thing?
4 Why shouldn't it say, gee, we've got
1,000
5 scientists over here that say yes, and we've got a
couple
6 people over here that say no. So, hey, what the
heck. But
7 they affirmatively said no. But even if she said,
you know,
8 what -- it's an open question -- they shouldn't
have, because
9 it wasn't an open question.
10 (Paraphrased reading:)
11
12 The defendant must have made
13 the representation with an opportunity to
14 defraud the plaintiff.
15 That is, the defendant must
16 have made the representation for the purpose
17 of inducing the plaintiff to rely on it and
18 to act and refrain from relying on it.
19
20 It's another one of these
instructions that
21 says the plaintiff -- anyone in the population who
listened
22 to this is in the class, anyone, not just Mr.
Boeken. Anyone
23 out there.
24 (Paraphrased reading:)
25
26 The plaintiff must have been
27 unaware of the falsity of the
representation,
28 must have acted in reliance upon the truth
of
5909
1 the representation, and must have been
2 justified in relying upon the
representation.
3
4 And here is a place where professor
5 Cobbs Hoffman would say, wait a second. Anyone --
she said
6 this -- anyone who would listen to tobacco industry
7 executives are fools. Anyone who would listen to
what their
8 clients, executives say, should have their heads

examined.
9 Anyone who would believe what a tobacco company
would say
10 would have to have a developmental defect.
11 This comes from a professor of U.S.
history.
12 And this comes from a professor of recent U.S.
history. And
13 I sure hope that future professors of U.S. history
don't have
14 to write that we have sunk to such a situation to
such a low
15 level that we should have our heads examined, and
we are
16 mentally defective or developmentally disabled if
we listen
17 to what the heads of gigantic corporations say.
18 Once upon a time in America, people
like this
19 used to be our leaders and respected, and not only
once upon
20 a time, but now, they get chosen for the cabinet of
the
21 government.
22 But professor cobbs Hoffman would
say, you
23 can't trust them, you shouldn't trust them; if you
trust
24 them, you're a fool.
25 What a defense. We're such snakes
that if you
26 trust us, you're a fool. What a defense.
27 That's called intentional
misrepresentation.

28 Here's a brother or a sister.

5910

1 (Paraphrased reading:)

2

3

Expression of opinion.

4

Ordinarily, expressions of

5

opinion are not treated as representations

of

6

fact upon which to base actionable fraud.

7

However, when one party

8

possesses or hold -- this is Philip Morris

--

9

when one party holds himself or herself out

10

as possessing superior knowledge or special

11

information regarding the subject of a

12

representation, and the other party is so

13

situated that he or she may reasonably rely

14

upon the supposed superior knowledge, a

15

representation made by the party

16

possessing -- holding himself or herself out

17

as possessing such knowledge or information

18

will be treated as a representation of fact.

19

When Philip Morris states an

20

opinion as a fact in such a manner that is

21

reasonable to rely and act upon the fact, it

22

is it treated as a representation of fact.

23

24

This is called (paraphrased reading):

25

26 Fraud and deceit,
concealment.
27 Philip Morris must have
28 concealed or suppressed a material fact
prior
5911
1 to July 1, '69.
2
3 Which is a magic cutoff date for us
here for a
4 couple of issues. One of the issues in this case
has to do
5 with a failure to warn. And another one of the
issues in
6 this case has to do with a failure to show people
how to
7 properly use a product. And I'm talking about
light
8 cigarettes. And I'm talking about compensation.
And I'm
9 talking about a situation where people who think
they're
10 smoking down to a lower tar cigarette, they really
think
11 they're going to get lower tar, and they don't.
12 Up until 1969, Philip Morris had a
duty to warn
13 the public, anyone, everyone, all users, about the
dangerous
14 propensities of its product.
15 The cutoff date, magically, is July
1, '69.
16 After that time, there was no such duty.
17 Similarly, up until July 1, 1969,
Philip Morris
18 had a duty to warn people who bought light
cigarettes that,
19 guess what, you're buying these low-tar cigarettes,
you think
20 you're going to get less tar, you think you're
going to get
21 less of the bad stuff, you think you've got less of
a chance
22 to get sick. Wrong, wrong, wrong, wrong, wrong.
23 After 1969, no such duty claimed in
this case.
24 So back to this.
25 (Paraphrased reading:)
26
27 The defendant must have
28 concealed or suppressed a material fact
prior
5912
1 to July 1, '69.
2
3 We've had a ream, mound, huge pile of
documents
4 in which they conspired to do just that. We're
going to
5 dummy up and not tell anyone about what we know
about what's
6 in these cigarettes and what it does to you.
7 The defendant must have been under a

duty to
 8 disclose that fact to plaintiff and everyone else
 that's
 9 smoking. Obviously, a manufacturer of a product
 has got to
 10 tell -- a reasonable manufacturer of a product has
 got to
 11 tell about the bad side effects, about what's
 really going
 12 on, not give false information, misinformation,
 13 disinformation.
 14 (Paraphrased reading:)
 15
 16 Philip Morris must have
 17 intentionally concealed or suppressed the
 18 fact with the intent to defraud plaintiff.
 19 The plaintiff must have been
 20 unaware of the fact and would have acted --
 21 would not have acted as he or she did if
 22 known of the concealed or suppressed fact.
 23
 24 And I want to tell you. I asked
 25 Richard Boeken -- and it's there in the volume of a
 26 deposition. And it's a what-if question. But what
 if they
 27 said -- they said, don't forget, Mr. Boeken was
 aware of the
 28 surgeon general's report. Mr. Boeken was aware
 that warnings
 5913
 1 were made. Mr. Boeken was aware of what he called
 a --
 2 what's the word -- brouhaha?
 3 MR. CARLTON: Something like that.
 4 MR. PIUZE: A brouhaha or thing-a-ma-jig, a
 fight
 5 between the tobacco companies and the surgeon
 general. He
 6 was aware of that. And he listened to it. And he
 said, you
 7 know what, I thought the surgeon general was on a
 political
 8 vendetta. I believed what she said. I listened to
 them. He
 9 and 50 million other people.
 10 Now, was he justified in listening to
 them?
 11 We're back to professor Hoffman now.
 According
 12 to professor Hoffman, no. When someone looks you
 in the eye
 13 and makes you promise and tells you, this ain't
 going to hurt
 14 you, don't worry about it. We promise you. You
 are not
 15 entitled to rely on that.
 16 Mr. Boeken did. Mr. Boeken is a
 businessman.
 17 Mr. Boeken has expressed admiration for big
 business. His
 18 wife backs that up. His wife said that's the
 centerpiece of
 19 his life. He really, really, really loves it. He

told you
these
responsible
5914
exists
exists
don't have
and you
reading):
tired of
And every
subject matter
everything it
5915
up or
misinformation or
Farone.
5
6
7
8
9

20 on his videotape deposition he couldn't conceive of
21 people standing up, all of these extremely
22 people, standing up and lying under oath.
23 He was wrong.
24 How about the cousin?
25 (Paraphrased reading:)
26
27 Fraud and deceit.
28 Active concealment of known
1 facts.
2 Intentional concealment
3 where a party, while under a duty to speak,
4 does, nevertheless, does so --
5
6 THE COURT: No. Under no duty to speak.
7 MR. PIUZE: Excuse me. That's a sign.
8 (Paraphrased reading:)
9
10 Intentional concealment
11 where a party, while under no duty to speak,
12 nevertheless, does so, but does not speak
13 honestly and makes misleading statements or
14 suppresses facts which materially qualify
15 those stated.
16
17 And the English of that is, if you
18 to say anything, but you do, and it's misleading,
19 know it is, and you suck someone in, that's wrong.
20 Here's another one (paraphrased
21
22 Fraud and deceit, false
23 promise.
24
25 But I'm tired of reading, and you're
26 listening. There are about seven of these things.
27 one of these things has to do with fraud. The
28 is fraud. And the issue is, Philip Morris knew
1 had to know and either lied about it or covered it
2 dummied it up or didn't let it out or gave
3 gave disinformation:
4 Listen to this, please. This is Dr.
5 MR. LEITER: Page number, please.
6 MR. PIUZE: 1549.
7 MR. LEITER: Thank you.
8 MR. PIUZE: (Paraphrased reading):
9

10 About a year and a half after
11 I had been there, I had been told by
12 Dr. Osdene on several occasions that one of
13 his main missions, as he put it, was to
14 maintain the controversy, meaning, keep
15 shedding doubt on whether or not Nicotine
was
16 addictive and whether or not smoking caused
17 disease.
18 It was his job to maintain
the
19 controversy?
20 About whether Nicotine was
21 addictive?
22 Even though you knew Nicotine
23 to be addictive?
24 It was his job to maintain
the
25 controversy about whether tobacco caused
26 disease.
27 Even though you knew tobacco
28 caused disease.

5916
1 It's an amazing -- this is the guy
who
2 said that if the Nicotine studies turn out wrong,
destroy
3 them.
4 This is the guy who said, if the
tests come
5 back from Germany, send them to my house. They're
going to
6 be destroyed.
7 This is the guy who showed Dr. Farone
a test of
8 a real, honest to God, real Marlboro cigarettes
back around
9 '79 or '80 that had been done for biological
activity, and
10 this has been a document that has never been found.
This is
11 a document that Philip Morris denies the existence.
Never
12 happened. Couldn't have happened.
13 This is page 1560 (paraphrased
reading):
14
15 Dr. Osdene was a colleague of
16 mine. It was his responsibility to do
safety
17 testing on cigarettes. The way this was
done
18 was to have the tests done in Europe and
19 Philip Morris -- at the time, I didn't know
20 Philip Morris actually owned a facility, but
21 Philip Morris used a facility in Germany
22 called the, in German, the institute for
23 biological technology. The ACRONYM is
24 inbifo, and that was a laboratory in Germany
25 where products were sent to be tested for
all
26 of the kind of testing that we just talked
27 about, the in vivo testing as well as the in

28 vitro testing.

5917

1 In vitro is a tease. In vivo is
2 real-life subjects, whether animal or not.
3 This is page 1513 (paraphrased
reading):

4
5 Did high-ranking people at
6 Philip Morris discuss the gentleman's
7 agreement with you?
8 Sure. Seligman, Osdene,
9 Wakeham, Resnick, carpenter, Kuhn, pages,
10 Hauserman, gaisch.
11 As they told it to you, why
12 not put up a Marlboro against a Winston or a
13 Winston against a kool or a kool against
14 whatever's out there?
15 His answer was: The
16 information could be used in court
17 proceedings like this to prove that the
18 products are carcinogenic.
19 If you do an animal test,
when
20 you do the animal test, what you're doing
is,
21 you're saying the animal is a model for
22 humans. You can never use an animal to
23 exactly mimic a human without using humans,
24 but you are not going to use humans in
tests.

25 Well, as it turns out,
26 epidemiology is a human test, but you don't
27 intend to test your products on humans to
28 start off with.

5918

1 So if they tested your
chances
2 in Winston versus Marlboro and your Marlboro
3 changes, and you showed that they caused
4 cancer in animals all the time that you did
5 this, then it would have been very, very
6 difficult to say that you didn't have any
7 evidence that it caused cancer, but you have
8 lots of evidence that it caused cancer in
9 animals.
10 So it just adds to the
11 information that we know about these
12 products.
13 If, in fact, there was a
14 difference between two brands that were
being
15 sold, the concern was that people would
16 always migrate to the safer one, obviously.
17
18 Before I turn the page, let me just
stop this.
19 That sounds pretty probable, huh;
that people
20 would migrate to the safer one?
21 This is Dr. Farone during his
cross-examination
22 by Mr. Leiter here at page 1594 (paraphrased
reading):

23
24 You would agree that there's
25 no such thing as a safe cigarette; is that
26 right?
27 And Dr. Farone said, I think
28 I've testified in the past -- I've given
5919
1 parameters of how we could state that a
2 cigarette could be safe where you couldn't,
3 epidemiologically, tell the difference
4 between the use of that cigarette and
5 nonsmokers; but I mean, in terms of a normal
6 cigarette, there's no such thing as a
7 cigarette., a normal cigarette on the market
8 right now that's absolutely safe.
9 Is it your testimony there
10 could be a safe cigarette on the market
11 today?
12 Yes, there could be a safe
13 cigarette on the market today.
14
15 But what happens, for instance, if
Cambridge
16 was on the market today, and Cambridge was 0.1
milligrams of
17 tar. What if?
18 99 plus percent less of the bad
stuff.
19 Virtually no bad stuff.
20 If there was a difference, he says,
between two
21 brands that were being sold, the concern was that
people
22 would always migrate to the safer one.
23 And if there was a difference between
two
24 brands that were being sold and people always
migrate to the
25 safer one, the foundation of the empire was in
jeopardy.
26 Cambridge cigarettes, hard to light.
And in
27 the 1980's, that cigarette had the lowest tar
figures ever,
28 ever seen, ever anyplace on a cigarette, and it was
hard to
5920
1 light.
2 I already mentioned this morning that
flavor
3 and Nicotine could both be put in the filter. I
asked
4 Philip Morris' witness, tell us you tried that or
tell us
5 that you can't do it, whatever the question was.
He
6 wouldn't. Dr. Farone said both of those things
could be
7 done., but it was hard to light.
8 And look what happened with that 20
years
9 later, and we come in here with an electronic gizmo
that

10 gives you seven puffs with a cigarette -- do it
with some 11 sort of a battery. Hard to light. Hard to catch
cancer. 12 Impossible to catch cancer.
13 Dr. Farone says there is such a thing
as a safe 14 cigarette, but they didn't want to pursue it. And
while I'm 15 on it, let me take two minutes there.
16 There was more than a day reading of
these 17 depositions. Uydess, Mele. One of them was a rat
18 researcher. He was a Nicotine researcher. The
research was 19 being done in Richmond, Virginia. It was done
under secret 20 conditions. The rats were brought in, covered up
with -- 21 they had tarps on them, and no one was supposed to
know they 22 were there. And they were secret animal labs, and
no one was 23 supposed to know about this. And it was all top
secret. 24 What they figured out was that these
rats were 25 just as hooked on Nicotine as they would have been
on 26 cocaine. And there are several documents either
that you 27 will see or that I'll get to and read that flat out
say, a 28 lot of people in science say that Nicotine is just
as 5921
1 addictive as heroin.
2 And Dr. Benowitz said that, too, when
he was 3 hear. And Dr. Benowitz is probably the world's
single 4 leading authority on Nicotine injection in the
world. And 5 when the surgeon general needed someone to write
his report 6 on addiction, that's where he went, to Neil
Benowitz. 7 Anyway, one of those two depositions
revolved 8 around the entire fact that Philip Morris was
conducting -- 9 keeping secrets from everyone else in richmond,
experiments 10 about rats wanting and needing and craving and
being addicted 11 to Nicotine. And that program one day was just
shut down by 12 authorities, people from New York. The people from
New York 13 took a look around, and the next thing you knew,
the entire 14 project was history.
15 And the other guy, Uydess. He was on

the nod
some
Really bad
was, gee,
him and/or
that was
prematurely.
between the
people would
business would
products
the
5922
company.
the board
little bit
Farone
than
5923
to ten more
2

16 project. And the nod project had to do with taking
17 really, really, really bad stuff out of tobacco.
18 stuff. And so you heard here the way it worked out
19 it smelled.
20 Well, the testimony you heard from
21 Dr. Farone -- one or both, I'm not sure -- was that
22 a viable project, and that project was set down
23 If, in fact, there was a difference
24 two brands that were being sold, the concern was
25 always migrate to the safer one. And a lot of
26 have been lost. You would have had to change the
27 too often.
28 And then he said that he heard about
gentleman's agreement the week that he joined the
2 This roper proposal that I had up on
3 talked about politics, so I just want to talk a
4 about politics.
5 This is page 1500. This is Dr.
6 testifying.
7 (Paraphrased reading:)
8
9 Dr. Seligman, who became my
10 boss, was very clear on the two main
11 functions that they were interested in my
12 helping them with. Based on my background,
13 one was diversification into areas other
cigarette products. And the second was
15 making the product, the cigarette product,
16 safer.
17 Seligman and Wakeham and
18 Resnick indicated they were concerned that
19 the cigarette industry would face increasing
20 regulation, the products would be either
21 banned or changed approximately in five to
22 ten years. They were thinking they'd have a
23 great deal of difficulty selling products,
24 therefore, they wanted to take the
25 opportunity to move into other businesses,
26 while, at the same time, trying to improve
27 the safety of the product.
28
In 1976, they thought they had five
years of unfettered business.

3 This is something that professor
Cobbs Hoffman
4 brought in.
5 MR. LEITER: May I see it, please?
6 MR. PIUZE: Sure. It's the cartoon from
1988.
7 MR. LEITER: May I see it for one more
second?
8 I'm sorry.
9 MR. PIUZE: I'll read it for you.
10 MR. LEITER: Your Honor, I'm going to object
to this.
11 THE COURT: Was this from Ms. Hoffman --
12 MR. PIUZE: Yes. It's been displayed when
she was
13 cross-examined.
14 MR. LEITER: Objection. Noerr pennington as
to the
15 argument.
16 THE COURT: If this was part of her
testimony,
17 something she reviewed, overruled.
18 MR. PIUZE: So anyway, that speaks for
itself.
19 Politics, public opinion and
litigation. And
20 I'm here, obviously, on the last, but they're
active not just
21 on the last. And so now I have a question. And
the question
22 is, how do you spell justice?
23 There's two possibilities. I guess
it depends
24 who you are how you spell justice.
25 But, Um . . .
26 Here's where I want to go. To
litigation. Not
27 to politics and to public opinion. This will be
the last
28 time I read this. I think this is super important
for
5924
1 Mr. Boeken. Super important for 5 or 10 or 20
other million
2 people.
3 (Paraphrased reading:)
4
5 In the cigarette controversy,
6 the people, especially those who are present
7 and potential supporters (tobacco state
8 Congressmen and heavy smokers) --
9
10 And I don't care about tobacco state
11 Congressmen. I care about heavy smokers.
12 (Paraphrased reading:)
13
14 -- must perceive, understand
15 and believe in evidence to sustain their
16 opinions that smoking may not be a causal
17 factor.
18
19 So let me put a name on that. Heavy
smoker,

20 Richard Boeken, who's been giving us his money
since 1957
21 when he was 13 years old, and who's been hooked on
this
22 product for the last 50 years, since he was 13
years old,
23 must perceive and must understand and must believe
in
24 evidence that will sustain his opinion that smoking
may not
25 be the causal factor to cancer.
26 So they're going to feed him and 5 or
10 or
27 15 or 20 or 40 million other people a little bit of
28 disinformation.

5925

1 (Reading:)

2

3

4

ready-made

5

6

7

8

9

10

11

12

13

14

15

16

17

smoking

18

19

20

'70's.

21

again.

22

cigarettes.

23

24

25

26

27

28

5926

1

2

3

4

5

6

7

8

9

10

11

12

Boeken --

"As things stand, we supply
them with too little in the way of

credible alternatives."

"The alternatives."

Two of them.

"1. The constitutional
hypothesis. People who smoke tend to differ
importantly from people who do not in their
heredity, in constitutional make-up, in
patterns of life and in the pressure under
which they live.

"2. The multifactorial
hypothesis. As science advances, more and
more factors come under suspicion as
contributing to the illness for which

is blamed -- air pollution" . . .

Air pollution. Los Angeles. Early

Might not be able to see your hand in front of you

That's what's causing your cancer. It isn't

It's that.

(Paraphrased reading:)

Viruses, food additives,
occupational hazards, stresses."

In 1970, our public opinion

survey showed that 52 percent believed that
cigarettes are only one of many causes of
smokers having more illnesses. It also
showed that half of the people who believed
that smokers have more illnesses than
nonsmokers accepted the constitutional
hypothesis as the explanation.

Thus, there are millions of
people --

and I want to stop here again.

Millions of people, including Richard

other 13 not Richard Boeken alone, not Richard Boeken and
who was a 14 members of alcoholics anonymous, not richard Boeken
become a 15 hippie, And not Richard Boeken who is going to
one of 16 conservative businessman -- but Richard Boeken, as
message. 17 millions of people who would be receptive to a new

18 And the new message is (reading):

19

20 "Cigarette smoking may not be
21 the main health hazard that the anti-smoking
22 people say it is because other alternatives
23 are at least as probable."

24

25 So in 1972, the tobacco institute
decided that

26 what should be done is to spoon-feed
misinformation,

27 disinformation, counter-information and lies to
people to

28 keep them smoking, to keep money rolling in. And

5927

1 unfortunately, to keep the undertaker busy.

2 This one document -- this is exhibit

330. This

3 one document, if there is one document in the case

4 the hypocrisy and the dishonesty and unforgivable

conduct of 5 the tobacco industry over a course of decades in

this 6 country, this is it right here. 330.

7 I'm done with this kind of document.

Promise.

8 1974. June. Lorillard.

9 (Paraphrased reading:)

10

11 Historically, the joint
12 industry-funded smoking and health research
13 programs have not been selected against
14 specific scientific goals, but rather, for
15 various purposes, such as public relations,
16 political relations, position for

litigation, 17 et cetera. It seems obvious that reviews of

18 such programs for scientific relevance and

19 merits in the smoking and health field are

20 not likely to produce high ratings. In

21 general, these programs have provided some

22 buffer to public and political attacks of

the 23 industry, as well as background for

litigious 24 strategy.

25

26 I'm showing you to show conspiracy --

27 (reading):

28

5928

1 "CTR is the best and cheapest

2 insurance the tobacco industry can buy, and
3 without it, the industry would have to
invent
4 CTR or would be dead."
5
6 And the amazing thing is, whoever
wrote that,
7 forget that the tobacco industry did invent CTR, or
it would
8 have been dead.
9 And this that we spent too much time
on in
10 1978, Dr. Summers, states that (paraphrased
reading):
11
12 The CTR should be renamed for
13 council for legally permitted tobacco
14 research.
15
16 Imagine that. Before we can do our
research,
17 we will have to run it past our lawyers. Our
lawyers will be
18 in charge of the safety and research for our
company. Not
19 our scientists, not our doctors, but our lawyers
will be in
20 charge of the research for the company.
21 And he talks about the fact that they
lost
22 Dr. Craighead. And there are two other documents
which I'm
23 not going show you, because I just don't want to
beat this
24 unmercifully to death, where there was talk about
other
25 people leaving the programs, other scientists
leaving the
26 programs because they can't put up with the outside
pressure.
27 Now, I'd like to talk about Mr.
Boeken.
28 Maybe it's best just to put it here.
If you
5929
1 want to bring one of those easels, you can.
2 Do you like being there?
3 Nice tie.
4 MR. GOLDSTEIN: Thank you.
5 MR. PIUZE: This is last time you're going
to get to
6 see this, probably. And I APPRECIATE your
attention in
7 looking at it.
8 This is a history in which we have
tried to
9 overlap what went on in Mr. Boeken's life with what
went on
10 in science with what went on in the misinformation,
11 disinformation, lying of the tobacco industry and
12 Philip Morris.
13 And this story covers, it looks like,
50 years,

14 almost. And unfortunately -- have you got that
 now?
 15 Here, let me slide this up here.
 16 Unfortunately, Philip Morris fessed
 up too late
 17 for Mr. Boeken. Just remember, as you look at this
 document
 18 here, every, single year on this document is
 400,000 lives
 19 that end prematurely from smoking in this one
 country. Just
 20 remember that of those 400,000, Philip Morris has
 half the
 21 market share. 200,000 every succeeding year.
 22 And also, please remember that for
 each and
 23 every single year you see here, roughly up to
 75,000, in
 24 round numbers, people die in the United States of
 lung cancer
 25 caused by smoking and tobacco and Philip MORRIS has
 26 50 percent of that share.
 27 So every year, it's 175,000 lung
 cancer deaths
 28 that are preventable from smoking. And every,
 single year is
 5930
 1 400,000 deaths overall that's preventable from
 smoking.
 2 Mr. Boeken, according to the only
 evidence
 3 we've had in this trial, uncontested from Dr.
 Hammer, right
 4 here -- or right here -- had lung cancer. 1989.
 He didn't
 5 know it. His doctors didn't know it. Those little
 cells
 6 were multiplying and multiplying and multiplying.
 It got ten
 7 years worth of multiplying to get to the size where
 it showed
 8 up.
 9 But way back in 1989, it was already
 too late
 10 for him. So by the time that Philip Morris decided
 to change
 11 its position, as Ms. Merlo said -- or excuse me --
 by the
 12 time, alternatively, that Philip Morris and the
 other
 13 tobacco companies got cornered, put in a corner
 from which
 14 they couldn't escape, and put up their hands and
 15 surrendered -- sort of, depending on how you look
 at it -- it
 16 was already ten years late for Mr. Boeken because
 he was
 17 going to get cancer, and lung cancer is not a
 curable
 18 disease.
 19 Slide that back now, if you would,
 please.
 20 1912, Titanic went down. More people

died in
lung cancer.
Dr. Doll,
fact if you
called the
this, you may
with lung
towards the
5931
cigarettes.
professor
twice.
there
According to
was banned
this
like a
we
By 1952,
enough
Frank
We've
There it is
picked up that
ashtray, a butt
here and
may pull

21 the Titanic than died in the entire country from
22 It was an almost unknown disease. Dr. Ludmerer,
23 Dr. Feingold, Dr. Strauss, they all discussed the
24 saw a lung cancer patient back then, the professor
25 medical students and said, come take a look at
26 never ever again see this in your lives. Someone
27 cancer. Amazing.
28 Cigarettes became popular going
20's. We had the machines that made the
Cigarettes were all over the place. According to
Cobbs Hoffman, there were seven or more states.
(Juror sneezes.)
Mr. Piuze: Bless you. Twice. It's always
Bless you.
According to professor Cobbs Hoffman,
were at least seven states that banned tobacco.
Dr. Doll, he thinks it was more than that. But it
in these states.
With the increasing use of tobacco in
country and in Europe, lung cancer rates went up
rocket.
1950, and when the first studies that
discussed too many times already were published.
there were more studies. And in 1954, there were
studies and there was a big enough deal so that the
statement was put out by the tobacco industry.
And there's the Frank statement.
discussed it and have read it and I've read it.
in 1954. We ain't going to hurt you.
1954's the year that Mr. Boeken
first cigarette out of a bucket -- out of an
out of an ashtray.
And then starts these commercials
these advertisements here. And after the break, I

5932
1 out a couple and flash them at you, and I may not.
I'll flip 2 a coin.
3 But there's an amazing thing here,
ultimately. 4 These guys -- and it may just be a coincidence.
We've heard 5 about Mr. Boeken and the way he presents himself
and what his 6 step kid thought about him, what his wife thought
about him. 7 Big, tough, well built, construction guy, outdoor
guy, 8 tanned, Harley, strong, in shape, guy's kind of a
guy. 9 Mrs. Boeken says, he was my Marlboro man. Okay.
10 Look at these guys. Tough, rugged,
tough, 11 anchors. They've all got an anchors tattooed on
the back of 12 their hand here. All of them. And then we get to
this guy. 13 Maybe the first known cowboy. And this guy is
sitting there 14 with an anchor on the back of his hand and a cowboy
hat on. 15 And Mr. Boeken winds up going in the navy and then
buying his 16 harley so he can get as close as he can to be the
Marlboro 17 man without actually having the horse.
18 This was him. This grabbed him.
This was his 19 identity. And you know what?
20 They've got great advertising. I
don't fault 21 them for it. But he bought into it hook, line and
sinker. 22 And we know that this guy here is 30
stories 23 high in Hong Kong on a couple of buildings, and we
know that 24 this stuff here is responsible for the second
greatest 25 product brand loyalty there is after Coca-Cola.
And 26 Mr. Boeken went for this and bought into this
entire thing. 27 So he became a Marlboro smoker, and
he's always 28 been a Marlboro smoker. And as time has gone on,
whether
5933
1 it's red or gold or tan or platinum or ultra or
whatever, 2 it's Marlboro, Marlboro, Marlboro, Marlboro.
3 In 1957 was when he really started
smoking. He 4 was 13 years old when he started smoking, and he
wasn't alone 5 when he started smoking.
6 In these years here, '50's and '60's,

according
this
in here
CBS
of his
on and on

7 to a defense expert, up to 60 percent of the men in
8 country smoked. And you know, there was testimony
9 about Eric Severeid, who was an extremely famous
10 newscaster who gave the news with a cigarette out
11 mouth, on the tonight show and the today show and
12 and on.

13 For those of you who were born in
another time
14 and another place, This is the way it was. When
the jury
15 back then left this room for a break, everyone had
a
16 cigarette, or lots of people had cigarettes.
That's the way
17 it was.

18 So here we go.
19 By here, by right in here, according
to
20 Dr. Doll, and by right in here, according to Dr.
Ludmerer,
21 right in there, depending on the words they used,
Dr. Doll,
22 no reasonable scientist could say that there wasn't
a
23 link -- or maybe it was Dr. Feingold that said
that. But the
24 handwriting was on the wall, huge, right in here.
25 Dr. Ludmerer says down here, there
was a big
26 consensus of scientific opinion. Whatever words
you want to
27 use. These are scientists now. These aren't
people. These
28 aren't people out in the open world. These are
scientists.

5934
1 So what happens to the manufacturer
of these
2 consumer products when it's put right in their
face, you got
3 a big problem here?
4 This is ten years after the Frank
statement.
5 Now, everyone's against you. What's up?
6 Denials and denials and denials.
Then just --
7 let this drop a little bit.
8 Then followed by -- I guess we don't
have --
9 creating doubt about the health charge without
actually
10 denying it.
11 Mr. Boeken met a woman. Mr. Boeken
liked the
12 woman. The woman didn't like cigarettes. Mr.
Boeken had a
13 choice. Boy, she was a nice woman. There go the

cigarettes.
14 For how long?
15 Three weeks. And then the woman
wasn't as
16 important as the cigarettes.
17 Just remember one of those documents
I read to,
18 a Philip Morris document that said that the
Nicotine is right
19 up there with eating and copulating. Think about
it. The
20 Nicotine is right up there with eating and
copulating; one of
21 the necessities of live.
22 And so he quit for three weeks there.
He quit
23 because he wanted the lady more than he wanted the
cigarette.
24 And then after three weeks, he didn't want that
lady anymore,
25 and he wanted the cigarette more. He described his
26 withdrawal symptoms, and they were classic.
27 One of the issues that I thought was
going to
28 occur in this case was a fight over whether or not
Mr. Boeken
5935
1 was addicted or not. But that's a fight that
didn't happen.
2 Because the defendants' last accident expert
witness said, I
3 changed my mind. He was addicted.
4 In 1966, I think, the first warning
labels went
5 on tobacco. And it's important for all of you
younger jurors
6 to realize that during this whole time, there were
no
7 warnings. There were no warnings of any kind.
There was
8 nothing.
9 And right in here, the first warnings
went on.
10 And the first warning said, cigarette smoking may
be
11 hazardous to your health. May be. Surgeon
general.
12 And then when we get up here into
1969, the
13 second warning label goes on, and that warning
label says,
14 cigarette smoking is hazardous to your health.
15 Did everyone believe that?
16 No.
17 Was there a reason why everyone
didn't believe
18 that?
19 Yes.
20 Was it an accident that everyone
didn't believe
21 that?
22 No.
23 Was there a reason for creating doubt

about the

24 health charge without actually denying it?

25 Sure.

26 What was the reason?

27 Do you have this?

28 Can you hold onto that?

5936

1 That is the reason.

2 Here's the roper proposal right here.

3 Mr. Boeken had bronchitis starting when he was a

teenager.

4 Mr. Boeken would smoke cigarettes through his

bronchitis.

5 Some of us know how that is. Mr. Boeken wanted to

be able to

6 run. Cigarette smoking interferes with your

ability to run.

7 Mr. Boeken didn't like the

bronchitis, and he

8 tried to quit here and he tried to quit here.

9 Did he know that smoking was bad for

some sorts

10 of his health?

11 Yes.

12 Did he know that it wasn't good for

bronchitis?

13 Yes.

14 Did he know that it would screw up

his ability

15 to run?

16 Yes.

17 Did he believe it would kill him?

18 No.

19 Did he believe it would cause lung

cancer?

20 No.

21 Did he believe it would cause serious

illness

22 and disease?

23 No.

24 Why not?

25 How could he be so dumb?

26 Well, he could be so dumb because he

listened

27 to them.

28 The incredible, unbelievable

diabolical defense

5937

1 in this case is, if he listened to us, the hell

with him. If

2 he listened to what we said, the hell with him.

3 1980. Two things happen. 1980. He

goes to

4 see Dr. Trabulus. You're going to see Dr.

Trabulus' records.

5 Someone said there were all these things in the

records about

6 when the doctor told him to stop smoking. That

ain't right.

7 Look at the record.

8 But he saw Dr. Trabulus and he laid

out his

9 history, and I'm sure Dr. Trabulus talked to him

about
10 smoking. Mr. Boeken said in his deposition --
quoted
11 Dr. Trabulus as saying, I'm not going to tell you
to stop.
12 And Mr. Boeken understood that to mean, I'm not
going to give
13 you a lecture, but I understood exactly what he
meant. And
14 Dr. Trabulus told you, this guy was hooked.
15 At any rate, in 19 -- meaning
addicted. That
16 because his doctors, his own doctors, saying, he is
addicted.
17 In 1980, same here. He went to see
18 Dr. Trabulus. He and his sister went and got
hypnotized, and
19 he stopped smoking for 35 to 40 days. And he could
not
20 maintain it.
21 And you know, I skipped a bunch of
stuff here
22 that we heard earlier. But here's one thing I
skipped.
23 In the navy. '65 to '65. Vietnam
war going
24 on. Knee surgery -- I'm sorry -- leg injury. Out
of the
25 navy.
26 Hippie. Living in a van. Smoked
some dope for
27 a couple of years. Didn't like it. Made him
tired. Made
28 him eat too much chocolate. Gave it up. Said the
heck with
5938
1 it.
2 1970, went north. Formed rock and
roll band,
3 which didn't happen. Injected himself with heroin.
Very
4 dangerous substance. In three months, he got
scared to death
5 of it. Now, heroin is an addictive, addictive
substance.
6 But he was scared of it. And because he was scared
of it, he
7 kicked it. And he went on a methadone program, and
that
8 methadone program lasted for approximately three
years.
9 Started in the San Francisco bay area, ended up at
the V.A.
10 on Sawtelle over in West L.A. And he kicked it.
11 He saw himself as drinking too much.
He said
12 on the videotape deposition he was never a daily
drinker. I
13 don't know how much he drank. I got no clue.
Doesn't
14 matter. He saw himself as drinking too much. And
he went
15 to AA. He went to AA to get clean and sober.

16 And in 19 -- what was the year he was
at AA?
17 1976, I think. Clean and sober.
This guy
18 hasn't had a drink, hasn't had any drugs other than
19 prescription drugs or Nicotine for 25 years. Went
totally
20 straight. No one disputes that. No one disagrees
with that.
21 He's extremely proud of that.
22 He met his wife to be at one of these
meetings.
23 She made an interesting comment when she was up on
the
24 witness stand here.
25 When she found out -- maybe through
her own,
26 I'm not sure -- but when she found out that people
were
27 saying, Nicotine was a drug, it got her all upset
because she
28 had been clean and sober since 1976, and to think
that she
5939
1 really hadn't been, that smoking Marlboros was
taking drugs
2 really upset her. And she testified here that when
she was
3 in AA, they never, ever told them it was a drug.
4 But I'd like to finish up here just
before our
5 break by quoting Mr. Boeken, Ms. Boeken, I think
6 Dr. Benowitz, for this purpose: When you go to AA,
when you
7 go to alanon meetings, go to meetings where there
are people
8 addicted to substances, smoke, cigarette smoke,
cigarette
9 smoke, cigarette smoke, more cigarette smoke.
10 Mrs. Boeken talked about sitting
outside of the
11 meetings on a patio and smoking where you could
hear the
12 meetings through the windows. Through the open
door. Her
13 son testified when he was a little kid he used to
go with his
14 mom and step dad to AA meetings and everyone would
be
15 smoking. People that had kicked all kind of drugs,
kicked
16 alcohol, they were all smoking.
17 Dr. Benowitz testified about drug
addicts
18 getting off heroin, getting off other drugs
smoking.
19 Smoking. Smoking cigarettes. And so it's a
strange thing,
20 but these people who spent so much time and so much
effort
21 and give so much of themselves to get off of these
22 substances, alcohol and heroin, and doing it
successfully,

23 kept smoking.
24 Now, why would that be?
25 Well, there's a couple of reasons,
but one
26 strikes me as far as Mr. Boeken is concerned.
27 He knew heroin was bad for him. He
quit.
28 There wasn't anyone out there that was saying to
him, you
5940
1 know, what; heroin might not be so bad after all.
We've run
2 some studies. We know. We've got scientists.
Heroin may
3 not be so bad after all.
4 He thought he was drinking too much,
and he
5 quit that. And there was no one out there
whispering to him,
6 hey, it's not what it's cracked up to be, don't
believe those
7 people. There are other reasons.
8 But when it came to cigarettes,
whether he was
9 rationalizing things, whether he was telling
himself stories,
10 whether -- as Dr. Benowitz said, an addict is
someone that
11 has to have something, and if there's a reason out
there to
12 justify it to himself or herself, they'll grab onto
that
13 reason -- he bought their line. And he kept
smoking. He
14 knew it wasn't good for him, bronchitis-wise. He
knew it
15 wasn't good for him, running-wise. And he made
continuing
16 attempts to try to get off of it.
17 But as far as, you're going to be
dead, he
18 bought into this. And now when I'm done, there
were certain
19 burdens that I've got in this case, burdens of
proof. We'll
20 talk about that after this break.
21 But when I'm done and I sit down, I
want to
22 pass the burden onto Philip Morris, and I want to
say, I want
23 to hear, why in the world should he be criticized
for
24 believing what you told him to believe?
25 That if you went out of your way to
create
26 doubt about the health risk and he bought into your
story,
27 how in the world can you be hypocritical enough now
to blame
28 him for that?
5941
1 Your Honor, do you want me to finish
this chart

2 or do what?
3 THE COURT: No. I think we really do need
to take our
4 break.
5 Thank you very much.
6 Ladies and gentlemen, we'll be back
at 3:20.
7 Don't discuss the case with anyone.
8 Try to be back here promptly.
9
10 (RECESS.)
11
12 THE COURT: Our jury panel is back with us;
counsel
13 are present as well.
14 Mr. Piuze.
15 MR. PIUZE: Thanks.
16
17 (Videotapes being played.)
18
19 MR. PIUZE: Used to be that at night,
instead of
20 seeing ads for donating money to homeless shelters
and giving
21 free water to flood victims and doing all those
great things,
22 it used to be that every, single night when people
turned on
23 their television sets in this country, what you
just
24 saw -- the white is the area that was not sponsored
by
25 tobacco.
26 And so if someone turned on their
television
27 set in the '50's or the '60's, tobacco commercials
were
28 everywhere all the time. It's a nice thing. It's
good for
5942
1 you. Look how healthy it is. If you want to be a
cowboy,
2 et cetera. And you know what?
3 Good advertising is good advertising.
But for
4 those of us who have been brought up under
proposition 99 or
5 if we see alligators or see tobacco company
executives
6 smoking in the room, laughing diabolically --
7 MR. LEITER: Objection. Outside the
evidence.
8 MR. PIUZE: Ms. Merlo talked about that.
9 THE COURT: Proceed.
10 MR. PIUZE: Mrs. Merlo said should she was
one of
11 them. The kind of warnings that out are there now.
12 Boom, boom, boom; don't, don't,
don't, don't.
13 With respect to -- And the kind of
stuff that
14 said do, do, do, do were everywhere all the time.
15 Look at -- all the time. So that's

when
16 Mr. Boeken was brought up. Right there.
17 That's Philip Morris advertising.
Just
18 happened to be on a particular season --
19
20 (juror sneezes.)
21
22 MR. PIUZE: Bless you.
23 -- 1963. And I find no fault with
them
24 advertising their product. I'm not pointing any
blame at
25 them for advertising their product.
26 But I'm simply showing all of you
that
27 Mr. Boeken, when he turned on his television, it
was there.
28 It was everywhere. It was in magazines. It was on
5943
1 billboards. It was on television. It was on
everyWHERE.
2 And it wasn't warnings. It was, look
at this
3 great cowboy. Look at -- I'm not going to show you
all of
4 them, but just a quick selected sample here that he
talked
5 about in his deposition.
6 Look at those guys. They're marines.
They're
7 the fighters. Yeah. Marines. That's what I like.
He
8 thought one of them might be John Wayne.
9 And we heard commentary on all of
these ads
10 from professor Goldberg about what they were
designed to
11 attract. And again, I find no fault whatsoever. I
mean, if
12 they're going after kids, I find fault. If they're
going
13 after adults, I don't find fault. But this is just
to show
14 you what he was exposed to.
15 And there are no warnings in any of
these ads.
16 That's the only one I recognize for
sure.
17 Paul hornig. Notre Dame. Smoked Marlboros.
Greenbay
18 packers.
19 And then later, this.
20 And we heard from Mr. Boeken in his
deposition
21 that he had the jacket. He went out and bought the
fringe
22 suede Jacket. He did everything but buy the horse,
because
23 he couldn't have a horse. And he got himself, I
think, a
24 Triumph 650 over in England instead when he went to
Europe in

25 1966.
26 And by the time he met his stepson,
now he had
27 a Harley. So he had his motorcycle, as I said, he
said in
28 his deposition, instead of a horse, but that's how
he saw
5944
1 himself. That guy. Right there.
2 Strangely enough, his wife used to
call him her
3 Marlboro man. I mean, what is that message of that
guy
4 leaping over that fence?
5 It's not, you're going to get sick.
6 Now, it's okay for Marlboro guys to
smoke light
7 cigarettes. And gee, he did.
8 I'm going to get to light cigarettes
in just a
9 bit.
10 So anyway, in the 1950's and the
1960's when
11 Mr. Boeken was a kid and a young man and a young
adult, he
12 didn't see what we see today. He didn't see
negative,
13 negative, negative, don't do it, don't trust them,
don't
14 believe them, alligators, smoke-filled rooms.
15 He saw cowboys, and he saw tough
guys, and he
16 saw people who said, you said it's cool and
sophisticated.
17 This is the way it is.
18 Someone here -- it was professor, Dr.
Ludmerer
19 said, you don't want to be judging medical science
by
20 hindsight. And I asked him, is that true of
regular human
21 beings, too?
22 Do you want to judge regular human
beings by
23 hindsight?
24 And he said, it's not a good idea
judging
25 anyone by hindsight.
26 And so when the time comes for Philip
Morris to
27 say, tough -- like Richard Boeken -- tough luck to
you, I ask
28 you to judge Mr. Boeken not in hindsight, but I ask
you to
5945
1 judge Mr. Boeken by the times that he was in.
2 And you know what?
3 I will extend the same; that's what's
good for
4 the goose is good for the gander courtesy to Philip
Morris.
5 Let's not judge them in hindsight. Let's judge
them by what

6 they knew at the time. So before I put this time
line back
7 up here, don't forget. This is what Mr. Boeken was
doing.
8 This is what the industry was doing. This is what
knowledge
9 was doing.

10 Let me just jump back a little bit,
if I could,
11 to Philip Morris.
12 Can we see there, too, the scientist
and the
13 executive, please.
14 1976.

15
16 (Videotape being played.)
17

18 MR. PIUZE: So that's the scientist.
19 Let's hear from the executive. '76.

20
21 (Videotape being played.)
22

23 MR. PIUZE: Two years earlier, two people
over at the
24 Lorillard tobacco company shared this confidential
memo,
25 which we've seen. This blowup is not going to be
available.

26 This will be in a much, much smaller size.
27 But i'd like to use a couple of your
precious
28 minutes and our precious minutes to discuss this.

5946
1 1974 (paraphrased reading:)

2
3 The joint industry funded
4 smoking and research programs have not been
5 selected against specific scientific goals,
6 but rather for various purposes, such as
7 public relations, political relations,
8 positions on litigation,
9 et cetera. It seems obvious that reviews of
10 such programs for scientific relevance and
11 merit in the smoking and health field are

not
12 likely to produce high ratings. In general,
13 these programs have provided some buffer to
14 public and political attack of the industry,
15 as well as background for litigious

strategy.
16
17 Four years later, Lorillard
(paraphrased
18 reading):
19

20 We have again "abdicated" the
21 scientific research directional management
of
22 the industry to the "lawyers" with virtually
23 no involvement on the part of scientific or
24 business management side of the business.
25 Lorillard's management is
26 opposed to the total industry future being

in
27 the hands of the committee of counsel --
28
5947
1 counsel, as in good co-counsel, as in
lawyers.
2 (Paraphrased reading:)
3
4 Lorillard's management is
5 opposed to the total industry future being
in
6 the hands of a committee of lawyers. It's
7 reminiscent of the late 1960's when the
ramms
8 group ran the tobacco institute, ctr and
9 everything else involved with the industry's
10 public posture.
11
12 We heard -- okay. That's Lorillard.
So what?
13 And we spent a little time on the
fact that
14 Philip Morris saw it differently. Excuse me. This
is '77.
15 Right in between that period. Seligman and Osdene.
16 Osdene says (Reading):
17
18 "It's my strong feeling that
19 with the progress that has been claimed, we
20 are in the process of digging our own
grave."
21
22 Now, think about that. He sees
honest
23 scientific research as digging Philip Morris' own
grave.
24 (Reading:)
25
26 "I believe that the program
27 as set up has the potential of great damage
28 to the industry, and I strongly urge that
the
5948
1 whole relationship of our company to CTR be
2 carefully reviewed. I'm very much afraid
3 that the discretion of the working taken by
4 ctr is totally detrimental to our position
5 and undermines the public posture which we
6 have taken to outsiders."
7
8 So this guy -- you know, if Philip
Morris wants
9 to distance itself from him, a former top-ranking
exec --
10 Philip Morris says, Gee Whiz, nothing
like that
11 happens here. But when the first of their
scientific
12 witnesses was here, I asked him if it wasn't true
that right
13 now out -- this is a former Ph.D. chemist from
Philip Morris
14 saying he was told to destroy documents as late as

-- and he
15 said, yeah, well, that's the allegation.
16 Anyway, whether they want to distance
--
17 whether Philip Morris wants to distance itself from
this man,
18 a very high-ranking responsible -- we never heard
he was
19 fired. We never heard he was kicked out. We never
heard he
20 was denied his pension. We never heard anything
about him,
21 except he's still around.
22 This guy says, honest science will
dig our
23 grave, and honest science is totally detrimental to
our
24 position and underlies the public posture we take
to
25 outsiders.
26 And so that leaves us, I think again
--
27 everybody, the court, counsel, ladies and gentlemen
-- I
28 thank you for your patience here. But that leaves
us with my
5949
1 last topic that I'm going to be able to get to
today, and I
2 promise I will finish as quickly as I can tomorrow.
3 This first one Dr. Hoshizaki did not
agree to.
4 So it's up there, but she didn't agree to that.
5 I made this little chart here showing
what
6 Lorillard thought of the CTR versus what Philip
Morris
7 thought of the CTR. And she pointed out, well, it
wasn't
8 Philip Morris. It was just Dr. Osdene.
9 I'd like to tell you in advance, this
is before
10 you ever saw, and certainly, before she ever saw,
the memo
11 that I showed you earlier where three Philip Morris
12 high-ranking executives called CTR a front and a
shield.
13 That was their words. Philip Morris' words were
front and
14 shield.
15 But anyway, at the time and without
the benefit
16 of that information, either for her or the jury,
this chart
17 was set up, and it shows that Lorillard believed
that the CTR
18 was a political front, public relations front, a
litigation
19 front, and it was being run by lawyers.
20 On the other hand, Dr. Osdene didn't
like the
21 biomedical research that was being done there. And
a

22 question was asked, which was sort of -- by Mr.
 Carlton on
 23 redirect examination -- well, it really can't be
 both of
 24 those things at the same time, can it?
 25 And you know what?
 26 It can.
 27 So the rough analogy -- and it is
 rough -- that
 28 I thought of is as follows: CTR is a cat.
 Lorillard is a
 5950
 1 mouse. Philip Morris is a Rottweiler. Now, when
 the mouse
 2 describes what a cat is, imagine what the mouse
 would say.
 3 But when the Rottweiler describes what the cat is,
 that dog
 4 sees the cat in a slightly different way.
 5 Here, Lorillard -- and I'm not here
 to praise
 6 Lorillard -- but here, Lorillard, through its
 management,
 7 thought that the committee for tobacco research was
 a front,
 8 was a shield, was for political reasons, was for PR
 reasons,
 9 was for litigation reasons and was something cooked
 up by a
 10 bunch of lawyers who were running a company,
 running an
 11 organization, running the industry.
 12 Philip Morris is in a totally
 different
 13 position. Philip Morris was a different kind of
 company, and
 14 Philip Morris saw it differently. And I'm sure as
 heck not
 15 here to praise Philip Morris.
 16 Philip Morris saw it as something
 that
 17 threatened its position in the marketplace because
 it was
 18 doing honest to God research. And anyone in the
 mid '70's or
 19 earlier that was doing honest to God research was
 20 jeopardizing Philip Morris' financial position.
 21 And I cannot put it any better than
 Dr. Osdene
 22 put it. Honest research digs Philip Morris' grave.
 Honest
 23 research is totally detrimental to Philip Morris'
 position.
 24 Honest research undermines the public posture that
 they've
 25 taken with outsiders.
 26 One those outsiders that it took a
 position
 27 with is my client, Richard Boeken, who's dying of
 lung
 28 cancer -- and he couldn't even stick around for
 oral argument
 5951

1 here today.
2 So in 1977 -- I got through the 70's
when I
3 stopped and I interrupted to show that chart.
4 But in the 1970's, if we want to
judge
5 Richard Boeken and we want to find out why he did
certain
6 things, let's think about who was molding his
thought. Let's
7 think about who was putting thoughts in his mind,
was
8 channelling what was being done.
9 Philip Morris thought the truth would
dig its
10 grave. And you know what?
11 It would have.
12 And you know what?
13 I hope it does.
14 And you know what?
15 Tomorrow morning, I'm going to
describe how it
16 should be done.
17 Thank you for listening.
18 THE COURT: All right.
19 Ladies and gentlemen, it's now 4
o'clock.
20 We'll see you tomorrow morning at
8:45.
21 Try to be prompt.
22
23 (AT 4:00 P.M., AN ADJOURNMENT WAS
TAKEN
24 UNTIL friday, may 8, 2001 AT 9:00
A.M.)
25
26
27
28